RECORD AND BRIEFS

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICI BRIEF OF LAW AND RELIGION PRACTITIONERS IN SUPPORT OF PETITIONER

MARK GOLDFEDER
ANTON SORKIN
CENTER FOR THE STUDY OF LAW AND RELIGION
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall, Suite 310
1301 Clifton Road NE
Atlanta, GA 30322
mark.aaron.goldfeder@emory.edu

DAVID I. SCHOEN
Counsel of Record
2800 Zelda Road
Suite 100-6
Montgomery, AL 36106
(334) 395-6611
Dschoen593@aol.com

ELLIOT PASIK
366 Pearsall Avenue
Suite 5
Cedarhurst, NY 11516
(516) 371-2800

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI*[1]

Amici are academics and practitioners who write and work in the field of law and religion. Our interest is in making sure that the proper balance is struck between the clauses of the First Amendment.

David Schoen has 30 years of extensive complex litigation experience as lead counsel in trial and appellate courts throughout the country. In addition to his law practice, David has taught as an adjunct professor in the fields of Criminal Procedure, Trial Skills, and the First Amendment and has lectured widely in continuing legal education programs in these fields and in the fields of Legal Ethics, Civil Rights Litigation, litigation under the Anti-Terrorism Act, and Evidence.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, Director of the Law and Religion Student Program, and Director of the Restoring Religious Freedom Project at Emory. He is also adjunct professor of Religion at Emory University and an adjunct Professor of Law at Georgia State University. He has written dozens of articles on law and religion topics.

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[1] *Amici curiae* affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than *amici*, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

Anton Sorkin is a graduate student at Emory University's Center for the Study of Law and Religion. He received his JD from Regent University School of Law and has worked extensively on various projects in the area of law and Religion.

Eliot Pasik is President of the Jewish Board of Advocates for Children (JBAC) and a lawyer in private practice. JBAC is a nonprofit that is dedicated to the proper spiritual, physical, intellectual, and social development of children.

SUMMARY OF ARGUMENT

Federal and state law cannot discriminate on the sole basis of religion against an otherwise "qualifying organizations" in the distribution of public grants that go towards a secular purpose. While Trinity Lutheran Church ("TLC") is undoubtedly a Christian institution with a religious mission, the Learning Center and the playground at issue in this case do not go towards advancing those interests, but instead serve the common benefit of the community in the safety of their children. This Court has made important distinctions regarding the allocation of funds that go towards advancing religion and those funds indisputably marked off from any religious functions. It is important for this Court to reaffirm its precedent that the separation of church and state requires government neutrality, neither favoring or disfavoring religion, and allow the allocation of the DNR grant for resurfacing the playground at Trinity Lutheran Church for the sake of upholding equal protection under the Fourteenth Amendment.

ARGUMENT

Federal and state governments cannot discriminate against a church, synagogue, or mosque for the sole reason that said entity is a religious body. This simple fact is rooted in much of this Court's jurisprudence. *See Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1 (1947); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203 (1963); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The State of Missouri and the court below nevertheless declared that petitioner Trinity Lutheran Church (TLC) could be disqualified from assistance under an indisputably secular program (viz., for converting used automobile tires into safe playground surfacing) solely because it is a church. TLC's municipality granted its application upon deeming it a "qualifying organization," fully aware of TLC's disclosure that the Learning Center hosting the playground was part of the Church. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). In fact, TLC's application was ranked fifth out of 44, and the top fourteen projects were funded. *Id.* It was only after "further review" that the Department changed its mind about TLC's eligibility due to its religious affiliation. *Id.* The Department then went on to fund fourteen other projects. *Id.* We ask this Court to reverse the judgment below.

I. IT IS UNCONSTITUTIONAL TO DISCRIMINATE AGAINST A HOUSE OF WORSHIP SOLELY BECAUSE OF ITS RELIGIOUS AFFILIATION.

Express governmental discrimination against a church is generally unconstitutional. *Lynch*, 465 U.S. at 673 ("[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *see also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (holding this Court does not "find in the Constitution a requirement that the government show a callous indifference to religious groups [...] we find no constitutional requirement which makes it necessary for government to be hostile to religion . . . .").

In particular, this Court has held that "cutting off church schools from . . . services, so separate and so indisputably marked off from the religious function . . . is obviously not the purpose of the First Amendment." *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947). A similarly nuanced reading of the First Amendment has been repeatedly stressed by Justice Breyer. *See Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16–17 (1st Cir. 1983) (Breyer, J., concurring in result) (noting, where benefit at issue "is support for child safety rather than support for the church," "[t]he First Amendment . . . is impartial . . ., and that impartiality implies that it not penalize parochial school students"); *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring) ("[A]bsolutism is not only inconsistent with our national traditions . . . but

would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.").

Unlike the cases quoted above, the one at bar is not about the Establishment Clause. But it is important to note that the Religion Clauses can never be fully separated, and that the Court has "struggled to find a neutral course between [them], both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668–69 (1970).

Aside from these First Amendment considerations, the Equal Protection Clause requires that "all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Unequal treatment can violate Equal Protection even if it was enacted without the intent to harm a particular group. *See* James G. Dwyer, *The Children We Abandon*, 74 N.C. L. Rev. 1321 (1996). The Constitution forbids even a government's mere indifference to a group's safety. *Id.* But unequal treatment is especially circumscribed when it rests on no more than "a bare desire to harm" a particular group. *Id.* at 446–47 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Regardless of the reason why a government denies a similarly situated group common benefits, it bears the burden of providing an adequate justification for doing so. That justification must be compelling when the denial affects fundamental rights—such as religious liberty. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding classifications affecting fundamental rights trigger strict scrutiny).

This Court has found that private and public schoolchildren are similarly situated and deserve equal

treatment with regards to generally applicable public services and protective measures. *Everson*, 330 U.S. at 1. In *Everson*, this Court noted that firemen and policemen act to protect the lives of children regardless of their religion. *Id.* Similarly, religion has no bearing on the provision of safety services like streets, sidewalks, and sewage facilities. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 242 (1968). The same can be said for the program here helping students (and other neighborhood children) safely enjoy a school's playground facilities.

A reaction to the contrary is an overbroad response to an unrealistic inference of governmental favoritism toward religion. As multiple previous justices on this Court have remarked,

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Schempp, 374 U.S. at 308 (Goldberg, J., concurring).

Justice Breyer echoed this distinction in a case involving tuition vouchers that could be used at religious schools, setting apart benefits that finance core religious functions as constitutionally suspect. Here, by contrast, the grant goes towards the common benefit of the community. TLC plans to use its grant to resurface its playgrounds for the safety of the children attending its daycare, as well as that of those neighborhood children who regularly use the

playground after hours. It is also worth noting that attendance at the daycare is not dependent on the religious identity of the children. As the 8th Circuit noted below, the Learning Center has an "open admissions policy." *Pauley*, 788 F.3d at 782. One could hardly imagine a more community-centered benefit than a playground for neighborhood children, and it would be an unconstitutional shame to deny it safety resurfacing on discriminatory grounds.

II. ALLOWING THE DNR GRANT FOR RESURFACING TLC'S PLAYGROUND WOULD MITIGATE RELIGIOUS HOSTILITY AND RESPECT EQUAL PROTECTION.

While this case is not being litigated under the Establishment Clause, precedent interpreting that provision is illuminating. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Government . . . may not be hostile to any religion or to the advocacy of no-religion . . . "). It sheds light on the constitutional policies behind the prohibition on government hostility toward religion. It shows why the two rationales relied upon by the court below—unjustifiable fears of a playground resurfacing grant having religious objectives, and a supposed safe haven from a state having to allow religious schools equal access to common benefits—are unacceptable as a matter of law. *See Pauley*, 788 F.3d at 783–84.

A. *The fear of subsidizing religious institutions does not excuse unbalancing peaceful coexistence between government and religion.*

The constitutional prohibition on government hostility against religion requires allowing the DNR grant to fund playground resurfacing at the Learning Center. The need for the government and religion to coexist without a trace of mutual hostility and suspicion towards one another found voice in Justice Breyer's concurrence in *Van Orden v. Perry*, when he wrote that the Religion Clauses

> seek to "assure the fullest possible scope of religious liberty and tolerance for all" . . . They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike . . . They seek to maintain that "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil."

545 U.S. at 698 (internal citations omitted). He also stressed the importance of maintaining social cohesion by avoiding absolute separation through the purging of religion from the public sphere. *Id.* at 698–99.

These concepts are all necessary considerations for this Court as it seeks to strike the right balance regarding access to government aid programs by religious organizations.

The right balance here favors equal access to the DNR grant for TLC. The DNR grant at issue has at least (to say the very least) as secular a purpose as did the Ten Commandments monument at issue in *Van Orden*. While TLC no doubt has a religious mission that encompasses the Learning Center, the grant will not go towards advancing religion. It will further the very secular purpose of ensuring safety for children. The First Amendment does not prohibit neutral programs that carry none of the dangers of favoring religion or causing divisiveness. The threat exuded by a playground resurfacing grant is nothing more than a "mere shadow." *Id.* at 704.

B. *Prior government aid cases require a balanced approach, not a walling off of common benefits from religious organizations' reach.*

The Eighth Circuit's opinion below cites to *Locke v. Davey* for the proposition that there is "play within the joints" between Free Exercise and Establishment, such that even though Missouri is not required to remove TLC from its funding scheme, it must still be allowed to do.

This is wrong. *Locke* did not allow for play within the joints when such play would have been clearly hostile towards religion. The *Locke* Court took care to note the solicitousness toward religion of the state constitution in that case. "We have found nothing," the *Locke* Court concluded, "in [that state's] overall approach that indicates it 'single[s] out' anyone 'for special burdens on the basis of . . . religious calling,'. . . ." *Locke v. Davey*, 540 U.S. 712, 725 (2004). Contrast this approach with Missouri's, as noted by the court below. *Pauley*, 788 F 3d at 783 (noting "a long

history of maintaining a very high wall between church and state").

The Eighth Circuit's interpretation eschewed the nuance of Locke for broad strokes. It characterized TLC's argument as the equivalent of requests of direct "public funds to a church." *Id.* It paid short shrift to cases where a neutral government program incidentally benefits religion. *See, e.g. Everson*, 330 U.S. at 17 (acknowledging that a public transportation subsidy program might help get some children to church who may otherwise not attend if parents had to pay); *see also Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16 (1st Cir. 1983) (Breyer, J., concurring) (holding Establishment Clause does not forbid a neutral transportation statute because of a theoretical possibility it could later "lead to disproportionately large expenditures favoring religious institutions").

Justice Breyer noted the difference between these two jurisprudential lines while concurring in a First and Fourteenth Amendment challenge to Rhode Island's statute "providing bus transportation to nonpublic school children beyond school district limits." *Schmidt*, 699 F.2d at 3. He looked to the spirit of Everson that announced that a law allowing for the transportation of children promotes "the welfare of the general public" and is not "designed to support institutions which teach religion." *Id.* at 13 (Breyer, J., concurring) (quoting *Everson*, 330 U.S. 1, 14 (1947)). He concluded that "proportionate state expenditure on school transportation is support for child safety rather than support for the church." *Id.* at 16 (citing *Everson*, 330 U.S. at 18).

He again picked up this reasoning in his dissenting opinion in *Zelman v. Simmons-Harris*, approving of neutral government grants to religion as a way of protecting the "Nation's social fabric from religious conflict." 536 U.S. 639, 718 (2002).

The pot of religious strife was only stirred further, in a culture growing more impatient with religious liberty claims, by Missouri's stipulation that government aid may **never** go to a religious organization.

The harmonious balance that this Court should strike is that while aid programs go towards financing core religious functions are improper, other forms of assistance are permitted when they hold "significantly less potential for social division." *Id.* at 726–27. In this case, the DNR grant would only support the safety of children on a playground and not TLC's religious mission. Granting it is thus the best way of furthering the neutrality required time and again by this Court. *See Epperson*, 393 U.S. at 104 ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) ("[O]ur cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' or 'inhibiting' religion"); *Lynch*, 465 U.S. at 673 (keeping in mind that an "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular"); *Schempp*, 374 U.S. at 306 (1963) (Goldberg, J., concurring); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014); *Brandon v. Bd. of Ed. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 975 (2d Cir. 1980) ("Separation is meant

to foster voluntarism and neutrality, and also to preserve the integrity of both religion and government . . . .").

Missouri has undeniably tipped the scale between favoring and disfavoring religion towards the latter in violation of the First Amendment. The decision below must be reversed and balance restored.

CONCLUSION

Opponents will argue that money is fungible, and that any support given to playground safety frees up funds to further religion down the line. This Court has rejected that argument in allowing for safe busing to private religious schools and coverage by public firefighters. This case is analogous. When children come to play, the state's secularist scruples must give way.

For all of these reasons, this Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

David I. Schoen
Counsel of Record
2800 Zelda Road Suite 100-6
Montgomery, AL 36106
(334) 395-6611
Dschoen593@aol.com

Mark Goldfeder
Anton Sorkin
Center for the Study of Law and Religion
Emory University School of Law
Gambrell Hall, Suite 310
1301 Clifton Road NE
Atlanta, GA 30322
mark.aaron.goldfeder@emory.edu

Elliot Pasik
366 Pearsall Avenue, Suite 5
Cedarhurst, NY 11516
(516) 371-2800

Counsel for Amici Curiae